

# The Intrusion of Mercy

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*On the basis of a communicative theory of criminal punishment, I show how mercy has a significant but limited role to play in the criminal law—in particular (although not only) in criminal sentencing. Mercy involves an intrusion into the realm of criminal law of values and concerns that are not themselves part of the perspective of criminal law: a merciful sentencer acts beyond the limits of her legal role, on the basis of moral considerations that conflict with the demands of penal justice. Sometimes, however (but in a decent system of law in a decent society, rarely), that is how citizens should act. Finally, I discuss, and criticise, two attempts to find a place for mercy within a communicative conception of punishment, and argue that repentance is not an appropriate ground for leniency or mercy in sentencing.*

## I. INTRODUCTION

Mercy is, of course, a virtue, and to act mercifully is to act rightly. We must ask when and on what grounds it is right to be lenient, when and under what conditions leniency is virtuous—just as we must ask when and on what grounds it is right to face danger, or to give to others: but we do not ask when it is right to be merciful, or when mercy is a virtue, any more than we ask when it is right to act courageously or generously, or when courage or generosity is a virtue. When facing danger constitutes courage, when giving to others constitutes generosity, it is right and virtuous: what we must ask is not when it is right or virtuous to be courageous or generous, but when it is courageous (and therefore right and virtuous) to face danger, when it is generous (and therefore right and virtuous) to give to others. Similarly, when leniency constitutes mercy, it is right and virtuous: what we must ask is not when it is right or virtuous to be merciful (since as a matter of definition it always is), but when, under what conditions it is merciful (and therefore right and virtuous) to show leniency.<sup>1</sup>

That question arises in different ways in different contexts in which some have the power or authority to inflict burdens or suffering on others, and we should not suppose that it will receive the same kind of answer, or that the same kinds of

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<sup>1</sup> Compare ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS*, Book II (J.A.K. Thomson trans., Penguin Books 1953), on the relation between excellences of character and the types of action and emotion that form their material. Leniency is the type of action or disposition of which mercy is the virtuous form.

factor will bear on its answer, in all contexts. The context that concerns us here is that of criminal law and punishment, and the question that concerns us is whether, when and given what conditions mercy has any place in that context. As we will shortly see, that question is actually two questions. First, is mercy an appropriate or relevant moral concept by reference to which we should ever judge the actions of legal officials, or they should ever deliberate about what to do? Or does the criminal law simply lie outside the moral jurisdiction of mercy, so that it is irrelevant to ask whether this or that action within the criminal law was merciful? Whilst generosity is a virtue concerned with giving to others, it is not one that is relevant to paying my bills, although paying bills is a kind of giving to others: it is not generous to pay more than I owe, or to pay just what I owe; it is not mean or ungenerous to pay no more than I owe, or to pay less than I am owe (that might be dishonest, or cheating, but it is not ungenerous); generosity is simply not relevant in this context. Similarly, whilst mercy is a virtue concerned with leniency in the imposition of burdens or suffering, we cannot assume in advance that it is relevant to all such impositions—that, in particular, it is relevant to the criminal law and the actions of its officers.

Second, if mercy is relevant to the criminal law, if it is something to which legal officials should sometimes attend in deciding what to do and in terms of which we should sometimes judge their actions, is its relevance internal or external to the criminal law? That is, does its relevance flow from the very aims of the criminal law, from the very values and principles by which the criminal law is, or should be, structured; is it in virtue of their role as officers of the criminal law that they should attend to considerations of mercy? Or do the demands of mercy come from outside the criminal law: do they constitute an intrusion into, rather than an aspect of, the criminal law's normative structure?<sup>2</sup>

In what follows I will first (in Part II) need to identify the kind of mercy that seems both morally and philosophically most puzzling, at least in relation to criminal law. This will not involve offering a definition of "mercy;" I do not think that the search for a definition is a useful way to approach the normative questions that are my main concern in this paper. All that I aim to do here is to identify the kinds of case that raise the problems I want to discuss. I will then argue that mercy is sometimes relevant to the criminal law, but that it is relevant as a justified intrusion into the criminal law, rather than as an aspect of the law's own normative logic: this argument will be developed, in Parts III and IV, through a discussion of two plausible kinds of ground for mercy in the criminal law—the offender's

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<sup>2</sup> Cf. John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279, 318–19 (2006) (distinguishing grounds for leniency that are "integral to" from those that are "extraneous to" a theory of punishment, or to "the logic" of punishment and arguing that mercy is integral to the communicative theory of punishment that he advocates). See also Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 188–93 (1976) (distinguishing justice "as a virtue of persons" from justice "as a virtue of social institutions" and arguing that mercy belongs with the former).

present suffering, and his past history. In both cases, the grounds for mercy are connected to the grounds for punishment—in the first case to the idea of punishment as a communicative process, in the second case to the idea of penal culpability: but mercy still marks the intrusion into the criminal process of values which are not properly part of the normative structure of the criminal law. However, although mercy irrupts into, rather than being already an aspect of, the criminal law in such cases, this is not to say (as some “critical” theorists might want to say) that mercy destroys the criminal law’s claims to principled rationality. It rather marks the criminal law’s place within a larger structure of plural, sometimes conflicting political values; this point will be explained in Part V. Finally, in Part VI, I consider two other recent accounts of the role of mercy in criminal law, both of which draw on a communicative theory of punishment.

## II. WHY IS MERCY PROBLEMATIC?

In the context of criminal law and punishment, mercy at least involves remitting or mitigating a burden of penalty to which the recipient would otherwise be liable.<sup>3</sup> It might be exercised by police officers or prosecutors, in deciding whom to arrest or prosecute, on what charges; or by sentencers, in deciding on a convicted offender’s punishment; or by prison officers, in administering an offender’s imprisonment, or by probation officers administering a probation order or a community service order; or by those who have the power to grant pardons or to commute sentences.<sup>4</sup> Whilst my focus, like that of most theorists who discuss mercy in the criminal law,<sup>5</sup> will be on sentencing, similar issues arise in other penal contexts, when mercy might be a matter of remitting the burden of investigation or prosecution, or ameliorating the conditions of imprisonment.

Four features distinguish mercy of the kind that is morally and philosophically puzzling. First, mercy is exercised by someone who has the effective authority to impose some burden or suffering, and the discretion to vary or even to remit that

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<sup>3</sup> I take the term “penalty” from DAVID GARLAND, *PUNISHMENT AND WELFARE* X (1985) to refer to the whole of the penal complex, including its sanctions, institutions, discourses and representations; although my focus in what follows will be especially on sanctions, mercy bears on all aspects of penalty.

<sup>4</sup> See generally KATHLEEN D. MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989).

<sup>5</sup> Moore, *supra* note 4, is one exception to this generalization. American theorists have also recently been exercised by Governor George Ryan’s decision, as he was about to leave office in January 2003, to commute the death sentences of all those on death row in Illinois. See, e.g., Stephen P. Garvey, *Is it Wrong to Commute Death Row? Retribution, Atonement and Mercy*, 82 N.C. L. REV. 1319 (2004); Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273 (2005). I take it, though I cannot argue the point here, that if Governor Ryan’s act was justified on grounds of either justice or mercy, the same grounds could have justified the imposition of a different sentence in the first place.

burden or suffering. In the case of sentencing, it is exercised by legal officers whose responsibility it is to determine sentences, and to whom the law allows at least some discretion to impose a lighter sentence than might otherwise have been imposed (or even to remit further punishment altogether). A bank robber who loosens the ropes with which he tied up a bank employee to relieve her suffering might be said to show “mercy”, although he has effective power rather than authority;<sup>6</sup> but whether or not this should count as mercy, such examples do not concern me here. A sentencer moved by compassion for the defendant might refuse to impose a mandatory sentence, thus violating her legal duty; but this is not an act of mercy of the kind that concerns me here.<sup>7</sup>

Second, mercy is not a matter of penal or retributive justice within the criminal law. As is often noted, what is called “mercy” can sometimes be seen as a matter of individual justice or equity;<sup>8</sup> the legal rules that define offences and prescribe sanctions for them can fail, as rules so often can, to do justice to features of the individual case that do properly bear either on the seriousness of the particular instance of the offence or on the defendant’s culpability for the commission of that offence. Sane systems of criminal punishment therefore provide zones of discretion for sentencers, within which they can attend to relevant particularities (especially those that mitigate rather than aggravate penal desert) and treat offenders more leniently than the formal rules prescribe. A sentencer who imposes a punishment less severe than she could in law have imposed, on the basis of desert-reducing factors to which the law allows her to attend, might be said to have shown mercy, but this is not the kind of mercy that concerns me here: my concern is with the kind of mercy that involves mitigating or remitting the sanction that is, from the perspective of the criminal law and the factors that it recognises as relevant, fully deserved—with mercy as something distinct from rather than a refinement of criminal justice. I will have more to say later about ways in which mercy as thus distinct from criminal justice could still be seen as a matter of equity (in Part IV); but it raises the puzzles and problems that concern me here only when it is thus distinct from penal or criminal justice.

Third, what grounds or motivates mercy is a concern for its recipient. There are plenty of reasons, both good and bad, for remitting or mitigating an offender’s deserved punishment: these include the likely impact of the punishment on others, its cost, and a range of benefits that might accrue from mitigating it (the offender’s cooperation in prosecuting others, other kinds of good that he might do if left unpunished). But whether or not leniency motivated by such considerations as

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<sup>6</sup> See George Rainbolt, *Mercy: In Defense of Caprice*, 31 *Nôus* 226, 228–29 (1997).

<sup>7</sup> See generally Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in *CHARACTER, LIBERTY AND LAW: KANTIAN ESSAYS IN THEORY AND PRACTICE* 59, 79 (1998).

<sup>8</sup> See, e.g., Jeffrie G. Murphy, *Mercy and Legal Justice*, in *JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY* 162, 169–72 (1988); Garvey, *supra* note 5, at 1325–30; John Tasioulas, *Mercy* 103 *PROC. ARIST. SOC’Y* 101, 109–14 (2003).

these should properly count as “mercy,” and many would deny that it should,<sup>9</sup> it is not what interests me here: my interest is in leniency grounded in a concern for the offender (I will say more later about the nature of this concern).

Fourth, mercy discriminates between offenders whose penal desert is relevantly similar:  $D_1$  and  $D_2$  have committed similarly serious crimes, causing similar harms, with similar kinds or levels of culpability; in the eyes of the criminal law, they deserve the same kind and degree of punishment; as an act of mercy the sentencer remits or mitigates  $D_1$ 's punishment, but not  $D_2$ 's. However, mercy (if justified) is neither arbitrary nor unfair. The sentencer has reason—indeed, good reason—to show mercy to  $D_1$ ; her mercy is not an arbitrary or whimsical act.<sup>10</sup> But whilst there could of course also be reasons to show mercy to  $D_2$ , the mere fact that the sentencer shows mercy to  $D_1$  but not to  $D_2$  when their cases are not distinguishable in terms of penal desert gives  $D_2$  no grounds for complaint; such discrimination does not in itself treat  $D_2$  unjustly or unfairly.<sup>11</sup>

The familiar puzzle is simply this: how could mercy, as thus understood, have any proper role to play in a system of criminal law and punishment? Mercy seems to flout the demands of penal justice. If we understand those as positive demands that offenders must be punished in accordance with their penal deserts, mercy fails to do penal justice to its recipient. Even if we understand the demands of retribution in negative terms, as demanding that offenders not be punished more harshly than they deserve, mercy seems to be unfair to those who do not receive it, and to flout the demand that like cases be treated alike.

I will not rehearse the various answers that theorists have offered to this puzzle.<sup>12</sup> Instead, in the following two sections I will discuss two kinds of ground for mercy, showing how they can best be understood, and justified, as intrusions into or disturbances of the perspective of criminal justice. These explications of

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<sup>9</sup> See, e.g., Card, *supra* note 2, at 186–87; Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 8, at 158; Murphy, *supra* note 8, at 173; Tasioulas, *supra* note 8, at 102–03.

<sup>10</sup> For a contrary view, see Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 107–08 (Hyman Gross & Ross Harrison eds., 1992). For an appropriate critique of this aspect of Harrison's account, see Tasioulas, *supra* note 8, at 104–07.

<sup>11</sup> Does this imply that Governor Ryan's commutation of the sentences of all those on death row, *supra* note 5, was not an instance of mercy, since it did not discriminate between those sentenced to death? It actually did discriminate modestly, since he commuted three death sentences to forty year prison terms, and another 164 to life imprisonment without parole; but suppose it had not? Given his reasons for the commutation (the radical inadequacies of the system of capital punishment; see Sarat, *supra* note 5, at 278–80), it was not anyway an instance of the kind of mercy that interests me here, but we need not decide now whether it should count, strictly speaking, as mercy, since I have eschewed such definitional issues. My interest is in the kind of discriminatory mercy that seems to raise a question about fairness between offenders.

<sup>12</sup> See Garvey, *supra* note 5, and Tasioulas, *supra* note 8, for useful critical surveys of recent accounts.

mercy will draw upon a communicative conception of punishment, which I have elaborated and defended elsewhere.<sup>13</sup> One interesting question that I will not be able to pursue is whether other conceptions of punishment could generate, if not the same rationale, at least a similar one: my suspicion is that they cannot, at least in relation to the first ground for mercy—in which case the plausibility of the account I offer here will add further support to a communicative theory.<sup>14</sup>

### III. COMMUNICATIVE MERCY

I begin with an extra-legal example, which offers a moral analogue of mercy in the criminal law. A friend has done me some moderately serious wrong: perhaps he has betrayed my trust in quite a serious way, or used something that I told him in confidence to his own advantage, in a way that causes me serious embarrassment or loss. I go to his home to confront him—to “have it out with him.” I might not know whether our friendship can survive—much depends on how he responds to me; but my immediate aim is to confront him forcefully with what he has done, to make clear how wrong it was, to communicate my hurt and my anger. I intend, that is, to criticise and censure him: my aim is to get him to understand, and ideally to accept, the moral condemnation that is appropriate to the wrong he has done. But when I reach his house, he greets me with the news that his wife has just died. At once (or so we might hope) my anger is replaced by sympathy: even if I did not know his wife myself, I share in his grief, and feel for him in his loss. As for my complaint against him, my determination to call him to account for the wrong he did me, of course I do not pursue it; indeed, one might hope that a true friend would simply forget about it—it would be pushed from her mind by the friend’s plight. I do not mention it myself as the reason for my visit, or as something that we need to talk about; if he raises it (perhaps because he feels guilty), I will brush it aside—“We needn’t [we shouldn’t] think about that now”.<sup>15</sup>

This seems a wholly natural and proper response; indeed, we would think it grotesque if I insisted on discussing the wrong he had done me. It is not perhaps a matter of mercy, since “mercy” suggests a relationship of effective authority which

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<sup>13</sup> R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); cf. ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993). Tasioulas, *supra* note 8, and Garvey, *supra* note 5, also appeal to communicative conceptions of punishment.

<sup>14</sup> Only retributive theories of punishment would be relevant here; purely consequentialist accounts have no room for mercy as a matter of remitting the punishment that would otherwise be justified.

<sup>15</sup> The “now” is best read as “given what has now happened,” but could of course be taken to leave open the possibility that I will return to the matter at some later date: that I am postponing rather than abandoning my intended criticism of him. Whether it will be proper to return to the matter later will depend on a wide range of factors—on the seriousness of the wrong, on the seriousness of what has befallen him and the length of time for which it (quite properly) occupies his and our attention; on the ways in which it changes him and us.

gives me the right, perhaps even a duty, to impose something on him—which is not true of my relationship to my friend. But it is a moral analogue of one kind of legal mercy: by understanding what it means, and why it is so obviously appropriate, in the moral case we can come to understand the role of one kind of mercy in the context of criminal punishment.

Why does his wife's death make it so obviously inappropriate for me to insist on talking about the wrong he did me, and castigating him for it? Since his bereavement post-dated the wrongdoing, it does not constitute any kind of excuse for or mitigation of that wrongdoing: it was and remains true that he deserves severe moral criticism for what he did. Nor should we say that I withhold criticism because he has already suffered (or been punished) enough by his wife's death: it would be—at best—morally crass thus to connect his wife's death to the wrong he did to me, as if it could be seen as a kind of "natural punishment" for it.<sup>16</sup> The point is rather that my criticism would be an attempt to get him to focus on, to attend carefully to, the wrong that he did me: but given what he has now suffered, it would be callously inhuman to expect him to do so. Indeed, the point is stronger than that. As his friend, my attention should now be focused on his bereavement, not on the wrong that he did, and it is not merely natural or understandable, but wholly proper, that that is where his attention is focused: there would be something not just strange or unusual, but morally disturbing, about a man whose beloved wife had just died, and whose attention was focused on the wrong he had done to another friend. In other cases, however, the focus of his attention on something other than the wrong he did might be seen as understandable rather than morally appropriate. Suppose that he had just been told by his doctor that he was suffering a terminal illness, for instance: we might regard it as heroic if he managed nonetheless to think repentantly about the wrong that he did me (whereas we would not be inclined to talk of heroism in the case of bereavement), but we would still think it inappropriate for me to try to make him think about it, or to claim that he ought to do so; it is quite reasonable that he should focus on his illness.

I have chosen an extreme example, in which it seems obvious that, even when the wrong committed was moderately serious, the wrongdoer's present suffering should drive it from the wronged person's mind, and would understandably (even properly) also drive it from the wrongdoer's mind. If we think about possible variations on the example, we will see that a notion of proportionality has a role to

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<sup>16</sup> Matters are of course different, in criminal law, but also in extra-legal moral contexts, when the wrongdoer suffers some serious loss as a result of his wrongdoing—as in the hackneyed example in which the reckless driver causes a crash that kills his child. I cannot pursue here the question of whether or when it can make sense to see such suffering as a "natural punishment" for the wrong he has done, or to say that he has been punished or suffered "enough." See PETER WINCH, *Ethical Reward and Punishment*, in *ETHICS AND ACTION* 210 (1972) (discussing the sense we can make of the idea of natural punishment); see generally Douglas N Husak, *Already Punished Enough*, 18 *PHIL. TOPICS* 79 (1990). However, it is hard to see how such suffering could serve the ends of communicative punishment.

play: the less serious the wrong, the less terrible the wrongdoer's current suffering needs to be to make it proper to turn our attention away from the wrong to the suffering (my friend failed to turn up to meet me for dinner, but when I visit him to castigate him I find that he has just been burgled); some wrongs might, however, be so serious that they cannot be thus put aside. A further point to note about such examples is that the most natural response to the wrongdoer's present suffering is not to mitigate my criticism of him; but to put it aside altogether. Perhaps—at least or especially if he raises the matter—I would dwell on it briefly, and in tones or terms more moderate than I might otherwise have used; but more probably I would simply refrain altogether from even a moderated form of the criticism that I would otherwise have offered—and that he certainly deserves.

Consider now what can happen in criminal sentencing. A defendant has been convicted of a non-trivial but not dramatically serious crime; at the sentencing stage it is revealed that his wife has just died, or that he has been diagnosed with a life-threatening illness; moved by compassion for his suffering, the sentencer discharges him without formal punishment.<sup>17</sup> It is no more plausible here than it was in the extra-legal case discussed above to see the suffering that motivates such leniency either as excusing or mitigating the offender's crime, or as some kind of natural punishment that makes legal punishment unnecessary; but we can make good moral sense of such leniency, given a communicative conception of punishment, as one type of mercy in criminal law.

The communicative aim of punishment is not simply to communicate to the offender the censure he deserves—although that is a central aim of punishment, as it is of the conviction that precedes punishment. It is also to bring the offender to face up, to focus on, the wrong he has done, as something that he should repent. The "hard treatment" which constitutes criminal punishment's material form in our existing systems of criminal justice is therefore integral to punishment's communicative function:<sup>18</sup> as a kind of secular penance, it is a vehicle through which the offender can be brought to confront his wrongdoing and to atone for it.<sup>19</sup>

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<sup>17</sup> Although the defendant is discharged without formal punishment, he perhaps does not escape punishment altogether: for he has been convicted, and conviction itself (as an act of condemnation which is intended to be painful to its recipient) can be seen as a species of punishment. See R.A. DUFF, *TRIALS AND PUNISHMENTS* 146–47 (1986). To say this is not to appeal to the idea that "the process is the punishment," see MALCOM FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979), but to a communicative conception of the criminal process and of what criminal convictions *ought* to be, and to mean.

<sup>18</sup> "Hard treatment" is Feinberg's term. See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95 (1970). It might mislead, as implying that punishment must be something oppressively painful—which is not how I intend it; by penal "hard treatment" I simply mean punishment that is burdensome independently of its expressive meaning. See DUFF, *supra* note 13, at 29, 107–09. For a different justification of penal hard treatment from within a communicative theory, see VON HIRSCH, *supra* note 13, at ch. 2. This justification has been criticised by Duff, *supra* note 13, at 86–88, and Tasioulas, *supra* note 2, at 290–93.

<sup>19</sup> See DUFF, *supra* note 13, at chs. 3–4; Stephen P. Garvey, *Punishment as Atonement*, 46



On this conception of punishment, an essential part of its message to, and intended impact upon, the offender is that he should focus his attention on his crime and its implications: the point of giving his punishment such materially onerous form (rather than imposing a purely symbolic punishment) is precisely to focus his attention on the crime. But that is not what we should say to him in this case; nor is it where our attention should be focused. Just as in the case of my friend, we should recognise that his attention will be quite understandably, perhaps quite properly, focused not on the wrong that he committed, but on what he has now suffered; and we should ourselves, as his fellow citizens, focus our concerns on that suffering, rather than on his wrongdoing.<sup>20</sup>

Here too, considerations of proportionality play a role: the less serious the crime, the less dramatic or terrible the offender's current suffering needs to be to make it proper to turn our attention away from the crime to the suffering; and some crimes are no doubt so serious that they cannot be thus put aside. There is also the question of whether this account can explain mitigations as well as complete remissions of sentence. At first glance it might seem that it cannot do so. To refrain from any punishment, beyond that integral to the conviction that the defendant has suffered,<sup>21</sup> is to recognise that his and our attention should be on his suffering, rather than on his crime; but to impose even a mitigated punishment is to say that he should attend, and to try to get him to attend, to his crime. This might be true, if mitigation is simply a matter of imposing a lighter sentence of the same kind—fewer years in prison, or a smaller fine, or fewer hours of compulsory community service, than the offender would otherwise have had to undergo; but there might be room for merciful mitigation as a matter of changing the material mode of punishment to one that does not make such total all-embracing demands on the offender. For an obvious instance, one could imagine replacing imprisonment by a non-custodial sentence on these grounds. Prison, as a total institution, gives the offender no respite from his crime; he is imprisoned, living within a penal structure, twenty four hours a day and seven days a week. By contrast (depending on the character and hours of the work involved) a Community Service Order leaves more of the offender's time and life intact, and thus leaves him more space to attend to other matters: it does not demand his total attention.

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UCLA L. REV. 1801 (1999); Steven Tudor, *Accepting One's Punishment as Meaningful Suffering*, 20 LAW & PHIL. 581 (2001); Tasioulas, *supra* note 2. A further dimension of penal hard treatment is that it constitutes symbolic, apologetic reparation to those who were wronged. See *infra* Part V.

<sup>20</sup> Why should this lead us to remit punishment, rather than just defer it? (Thanks to Stephen Garvey for pressing this question). See *supra* note 15. Perhaps deferral would be appropriate for a serious crime; but for lesser crimes remission might be grounded on an informal analogue of a statute of limitations, together with the thought that deferring punishment would unreasonably extend the whole penal process.

<sup>21</sup> Although in some cases that would merit mercy if they were carried through to conviction, the prosecutor might properly decide not to bring the case to trial at all.

We need to get clear about the relationship between mercy and penal desert in such cases, and about just how the considerations that ground mercy should figure in the deliberation that belongs with sentencing. Tasioulas discusses an example similar to mine as a case in which mercy might properly be shown:<sup>22</sup> he argues that while mercy does conflict with justice (with retributive justice), it plays a proper role *within* a suitably pluralist communicative theory of punishment, since a pluralist theory will recognise the importance of a range of values other than that of retributive justice. Sometimes, he notes, leniency in punishment may be justified by factors “extraneous” to a communicative theory of punishment, but mercy is grounded in factors “integral” to such a theory, when it is properly pluralist.<sup>23</sup> There is something right in this, since the reasons for showing mercy that I indicated above depend on a communicative conception of punishment: sentencers can properly show mercy when, and because, it would be cruel or inhuman to insist on the kind of forceful communication that punishment as thus conceived involves. Nonetheless, I think mercy is better seen as an intrusion into the criminal process, into the realm or perspective of punishment, of quite other considerations and values.

The criminal courtroom, in which trial, conviction, and sentencing take place, is a formal forum in which the various people involved have their roles to play. The defendant, the jurors (if there is a jury), the judge or magistrate, counsel, are meant to conduct themselves not just as citizens who happen to have come together, or as participants in an unconstrained moral discussion about the defendant and his past deeds, but precisely as players in this game—a game that defines their roles for them.<sup>24</sup> Part of what this involves is a set of limitations on what kinds of factor are relevant to the trial, and thus which aspects of the people involved and which aspects of their characters and histories, are relevant. Thus the defendant appears, for instance, not as a jazz-loving accountant with a wife and three children who admires Hillary Clinton and believes in God, and who has been having an affair with a colleague for several years, but as someone charged with a specified offence; the definition of the offence, and the law’s written or unwritten specifications of what factors bear on his legal guilt and his penal desert, identify and limit the aspects of his character or life which are relevant to the charge. Likewise, the judge and jurors are not to appear, think, or act as jazz-hating, left-wing atheists who hate adulterers (even if that is what they are): whilst those aspects of their character and values can properly affect their behaviour towards and responses to the accountant outside the courtroom, they should have no bearing on their treatment of him in court.

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<sup>22</sup> Tasioulas, *supra* note 8, at 117–18; see *R v. Bernard*, [1997] 1 Cr. App. R. (S.) 135.

<sup>23</sup> Tasioulas, *supra* note 8, at 114–23; Tasioulas, *supra* note 2, at 316–21 (on repentance, see further *infra* Part VI).

<sup>24</sup> To call it a game is not to imply that it is either unimportant or detached from reality; the term “game” here carries the kind of meaning it has in Wittgensteinian talk of “language games.”

These kinds of constraint have a particular significance and shape in a liberal polity that seeks to limit the reach and scope of its criminal law. One such limit concerns the range of conduct that will be defined as criminal: a liberal criminal law will seek to leave as extensive a realm of conduct as possible outside the reach of the criminal law. But another limit is more relevant here, concerning what we can call the depth of the criminal law—the extent to which it takes an interest in its citizens' motives, attitudes, or character; the extent to which it delves, whether in its offence definitions or in the kinds of inquiry that criminal courts are to make in determining guilt or punishment, behind the citizens' public actions into the dispositions and character traits that those actions express. A concern for this kind of limit is expressed in such familiar (although unclear and controversial) slogans as that motives are irrelevant to criminal liability; or that criminal liability must be for *action* that impinges on the world, not for mere thought or intention; or that criminal liability is grounded in action rather than in character. This is not the place to try to explicate and show the proper sense and force of such slogans,<sup>25</sup> save to note that this is one way in which a liberal law quite properly involves "abstraction:" it judges citizens, including those who appear in its courts as defendants and offenders, not as fully rounded human beings, but as agents who are to a significant degree "abstracted" from their complex social environment, and from the rich particularities of their own character and history. Some "critical" theorists portray such abstraction as problematic—both because it is a source of individual injustice, when the law fails to attend to the concrete particularities of the individual offender and the social context from which his offence emerged; and because such individualised particularities constantly irrupt into the law, thus destroying its pretensions to rational coherence.<sup>26</sup> But any system of criminal law that is to aim to do justice by attending only to relevant features of agents and their actions will need to "abstract," and to require its courts to "abstract," agents from their irrelevant features; and a liberal system of criminal law that is to respect its citizens' privacy will need to abstract agents quite drastically, if it is to avoid intruding improperly into the deeper, more personal, aspects of citizens' characters and lives.

A sentencer is therefore not required, indeed a liberal criminal law should forbid her, to base her sentencing decisions on an all-embracing consideration of

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<sup>25</sup> See also R.A. Duff, *Action, the Act Requirement and Criminal Liability*, in AGENCY AND ACTION 69, 69–72 (John Hyman & Helen C. Steward eds., 2004). For skepticism about the "act requirement," see Douglas Husak, *Does Criminal Liability Require an Act?*, in PHILOSOPHY AND THE CRIMINAL LAW 60 (R.A. Duff ed., 1998).

<sup>26</sup> For a good example, see ALAN W. NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 21–23 (2d ed. 2001); cf. BARBARA HUDSON, JUSTICE THROUGH PUNISHMENT: A CRITIQUE OF THE "JUSTICE" MODEL OF CORRECTIONS (1987); BARBARA HUDSON, PENAL POLICY AND SOCIAL JUSTICE (1993). For a response to Norrie's arguments, see R.A. Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability*, in PHILOSOPHY AND THE CRIMINAL LAW 156 (R.A. Duff ed., 1998).

the offender's whole life and character. She must attend, of course, to factors that bear on the seriousness of the crime, and on the offender's culpability in relation to that crime (although, as we will see in Part IV, a liberal criminal law will also strictly limit the factors that bear on culpability); she may also, depending on the system's sentencing principles, have to attend to the likely effects (at least on the offender) of this or that kind of sentence: but, as a sentencer, she must not normally look beyond those factors, just because it is not the offender as a fully rounded human being who is on trial: out of respect for his privacy, and given the criminal law's properly limited interest in its citizens, she must attend only to those factors that the law defines as directly relevant to guilt; and those factors will, as we have seen, be limited in scope and depth.<sup>27</sup>

But of course offenders are not just offenders, and sentencers are not just sentencers. As an offender, I appear before the court in a partial, limited persona; as a sentencer, I must think and act within the structure of my role, and see the offender in the terms that the law makes relevant. From within my role as sentencer I must ask what kind of punishment is appropriate to the offender's crime: this is to ask, given a communicative conception of punishment, what mode and severity of punishment will provide an appropriate vehicle for the communication that the offence requires (the communication of censure from community to offender, and the efficacious communication of apology from a repentant offender to the community). Now in imposing such a sentence I am claiming, in the name of the law and of the polity whose law it is, that this offender should be brought to confront her offence in this way, which is also to presuppose that such a focusing of her attention is appropriate. Normally, we hope, this will be true: that is to say, we assume that given the normal conditions of citizens' lives (and a lot lies behind that "normal"), and the importance of responding to the kinds of wrongdoing that the criminal law defines as crimes, it is reasonable to demand such attention from offenders.

Sometimes, however, things are not normal. Sometimes other aspects of the offender, as a human being, demand our attention, and reasonably occupy his attention. Sometimes the sentencer, as a fellow human being, cannot properly close her eyes to those other aspects: which is to say that she cannot properly continue to see and to respond to the offender simply as a sentencer dealing with an offender. The offender's present suffering, for instance, might be such that it cries out for a response—a response that cannot be captured within the kind of censorial communication that punishment involves. That suffering cannot figure *within* the sentencer's deliberations, qua sentencer, about what kind of punishment

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<sup>27</sup> The formal point here is not peculiar to the criminal law, although the substance of and grounds for these limitations differ from case to case. Think, for instance, of the limits that a conception of the relevant roles and practices sets on the factors that an examiner should consider in judging a student's work, or that would-be employers should consider in deciding whom to employ: in each case we can recognize some factors as properly relevant, and some as irrelevant.

is appropriate, qua punishment, to his crime: we should rather see it as undermining the propriety of taking that perspective on this offender. Qua sentencer, she should impose the penitentially appropriate sentence; but sometimes the sentencer should not act qua sentencer. That is why Card is right to separate justice “as a virtue of persons” from justice as a “virtue of social institutions,” and to argue that “mercy is an expression of justice as a virtue of persons who have the right to punish, but not an aspect of the social or legal justice of the institution by which they get that right.”<sup>28</sup>

Mercy, as thus understood in this kind of example, is therefore not a consideration that can operate *within* the perspective of criminal punishment: it is not a virtue of sentencers, qua sentencers; it is not a virtue internal to the role of sentencer within a system of criminal law. It is, rather, a virtue of the human beings who fill that role. A sentencer should recognise, and be motivated by, the importance of her role and its duties, the importance of the criminal justice system of which that role is part, and the importance of the perspective on citizens and their actions which structures that system: but as a human being (and citizen) she should also be able to put the criminal law and criminal punishment in their place, and to recognise that in some cases (cases that must be unusual, if the criminal law is to be possible) which do fall within the reach of the criminal law and its focus on public wrongdoing, it is not appropriate for her to think and act purely from within the perspective of the criminal law—purely within the confines of her role.

One might wonder why it matters whether we understand mercy as operating within the perspective of criminal punishment, or as intruding into that perspective.<sup>29</sup> Perhaps it makes little or no difference to the practical outcomes: but if we are to understand ourselves and our practices, we must get clear about their logic and the modes of thought that structure them—which requires getting clear about what belongs, and what does not belong, within a practice. If we think that mercy can properly play a role in the criminal process only if it is grounded in considerations internal to the perspective of criminal punishment, we will think that it must be grounded in considerations that make punishment inappropriate *as punishment*—in, for instance, considerations of penal justice; we are then liable either wrongly to deny that mercy can properly figure in the criminal process, or to distort our conception of penal justice so as to make room for mercy.

I will have more to say about this way of understanding mercy, as marking a breach in the normal bounds of the roles that various people must play within a criminal justice system later, but want first to consider a further possible ground for mercy.

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<sup>28</sup> Card, *supra* note 2, at 189.

<sup>29</sup> Thanks again to Stephen Garvey for pressing this question.

## IV. MERCY AND EQUITY

The criminal law typically recognises a very limited range of exempting or excusing factors that have to do with the defendant's control over his own actions, and with his status as a responsible agent.<sup>30</sup> Infancy and insanity (itself usually quite narrowly defined) exempt the (alleged) offender from criminal responsibility altogether; less dramatically incapacitating kinds of mental disorder might ground a partial defence of "diminished responsibility", which reduces murder to manslaughter,<sup>31</sup> or figure as mitigating factors in sentencing; and on some readings such defences or partial defences as duress and provocation also involve a claim that the defendant's rational control over his conduct was to some degree impaired—his "will," his capacity to act on the basis of a rational grasp of relevant reasons, was "overborne" by a threat that he faced,<sup>32</sup> or the provocation that he suffered caused him to lose his "self-control."<sup>33</sup> But unless one of these fairly exceptional conditions obtains, the offender is treated and sentenced as a fully rational and responsible agent. Furthermore, in the absence of any demonstrable condition of impaired or retarded development that might bring a defendant within the terms of the insanity defence, the law assumes either that he is responsible (as responsible as any of us ever is) for having become or being the kind of person he now is; or that responsibility for my present actions does not depend on my being responsible for having become or being the person who commits those actions.

This is not the place for a detailed discussion or critique of the criminal law's conception of responsible agency, or of whether (and in what sense) criminal responsibility for present actions should depend on responsibility for having become this kind of person. My own view is that criminal (like moral) responsibility is essentially a matter of present capacities: what matters is whether the agent, as she is now, is capable of grasping appropriate kinds of reason for action, of deliberating in terms of them, and of guiding (and answering for) her actions in their light;<sup>34</sup> if she is thus capable, we do not need to ask how she became the kind of person she now is. Even if this view is wrong, however, and ascriptions of criminal liability are just only if the defendant can be said to have been responsible for becoming what he now is, it is clear that the criminal law

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<sup>30</sup> On the distinction between exemptions (which negate responsibility) and excuses (which negate culpability but not responsibility) see VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 124–29 (2005); John Gardner, *The Gist of Excuses*, 1 *BUFF. CRIM. L. REV.* 575 (1998).

<sup>31</sup> See JEREMY HORDER, *EXCUSING CRIME* 146–69 (2004).

<sup>32</sup> *R. v. Hudson*, [1971] 2 Q.B. 202, 206.

<sup>33</sup> See Homicide Act, 1957, § 3; LAW COMMISSION, *PARTIAL DEFENCES TO MURDER* 30–71 (2004).

<sup>34</sup> For accounts of responsibility as "reason-responsiveness," to which I am appealing here, see JOHN M. FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (1998); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994).

does, and cannot but, presuppose that we generally are responsible in a relevant sense for our characters.

Of course, people have different genetic endowments, different backgrounds, different upbringings; they grow up in contexts that make it easier or harder to develop the kinds of attitude and value that underpin respect for the law: but the criminal law treats all alike, on the assumption that, in the absence of determinate incapacity or impairment, all satisfy the quite modest criteria of responsible agency. Furthermore, there is very good reason for the law to operate with such an assumption: not just because it would be impracticable to try to determine such responsibility in individual cases, but because this is one way in which the law respects those who are subject to it, by treating them as responsible agents who can be expected to control and to answer for their own actions, and to whom the law can therefore speak in the language of reasons for action.

There are of course those—so-called “hard determinists”—who think that that assumption is simply mistaken: we are not responsible, because no one ever is or could be responsible, for our characters or for being the kinds of people we are; and we therefore are not, because no one ever could be, in any deep or culpability-grounding sense responsible for the actions we commit as such people.<sup>35</sup> Such views are not my concern here. Assuming that most of us can generally be held responsible for our lives and actions, and in particular for the wrongs that we do, my concern is, rather, with cases in which, although the defendant does not satisfy any of the legally specified criteria of non-responsibility (criteria which are for good reason, as I noted, specified in strict terms), he makes us very uneasy about treating those criteria as dispositive. Given his background and upbringing, we might think; given the harsh, brutal, criminal environment in which he grew up; given the hand that fate has dealt him: how can we now condemn him for becoming, as he did become, a criminal, or for the crimes that he has now committed?<sup>36</sup> We can see that, and why, the criminal law should not recognize a formal excuse of “bad upbringing” or of “non-responsibility for character;” we can see that, and why, such factors should not normally figure as mitigating factors at sentencing. We can see, that is, why criminal justice should be blind to such things—in part because we can see, as liberals, why it is important to operate with a retributivism of “grievance” rather than of “character,” which focuses on what the defendant has done rather than on what he is.<sup>37</sup> But we must also recognize

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<sup>35</sup> E.g., RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* (1991); GALEN STRAWSON, *FREEDOM AND BELIEF* (1986).

<sup>36</sup> See Martha Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993), for a sensitive and nuanced exploration of some of the possibilities here. See also Tasioulas, *supra* note 8, at 116–17. For a useful critique of Nussbaum, see Christopher Bennett, *The Limits of Mercy*, 17 RATIO 1 (2004).

<sup>37</sup> See Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 149–51 (Amitai Etzioni & David E. Carney eds., 1997); see also

that this involves a kind of “abstraction” that, whilst necessary and indeed valuable for a liberal polity, depends for its justice on the satisfaction of certain conditions of “normality;” and in some cases those conditions do not seem to be satisfied.

But why should we not deal with this kind of case by revising the criminal law itself: by providing a special defence of non-responsibility or non-culpability based on the defendant’s history and how he came to be the kind of person he is, but limited to those exceptional cases in which his inheritance, background, or upbringing were demonstrably much less favourable than those that could count as “normal?” One answer to that question is Bennett’s: we should neither offer nor accept such excuses, since they deny the moral agency that is crucial to our respect for others or for ourselves.<sup>38</sup> I have some sympathy with that answer; and if we try to imagine a case in which the offender’s personal history is disadvantageous enough to make it seem plausible that even a firm commitment to respect for moral agency could be overridden by a merciful compassion for the offender, we might find that we are imagining a case in which the offender is not now a responsible agent who can operate in the realm of reasons—i.e., a case in which he would come within the reach of an ordinary insanity test. However, my interest here is in how we might answer the question if we see moral merit in the thought that an offender who suffered such a disadvantageous upbringing does not (“really”) deserve to be condemned for his present crimes, or condemned to the extent that someone without such an unfortunate history would deserve.

The crucial point, already argued above, is that there are good moral, as well as practical, reasons to maintain an institutional practice of criminal law and punishment that does not try to delve into such aspects of citizens’ characters and lives: to maintain an avowedly limited, and in an important sense shallow, institution which precisely abstracts from much of the rich depth of those lives. One implication of this is that the criminal law, as part of the coercive apparatus of a liberal state, should focus on our actions rather than our characters, and should take us as we are now, without inquiring into how we came to be as we are.<sup>39</sup> But to allow “seriously disadvantageous upbringing” as an excuse or as mitigation would require the court to make just the kind of inquiry into the defendant’s life and character that a liberal system of criminal law should not allow.

However, just because the criminal law is in this way a limited institution, which takes a partial and abstract perspective on those with whom it deals, its

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Tasioulas, *supra* note 8, at 116. Whilst I am not keen on the “grievance” label (because it might mislead us into focusing on the victim’s grievance against the offender), I agree that the criminal law’s concern is with action, not character. See *supra* note 25 and accompanying text.

<sup>38</sup> See Bennett, *supra* note 36.

<sup>39</sup> See, e.g., NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 65–68 (1988). The distinction between “action” and “character” is of course neither clear nor sharp in this context. See also R.A. Duff, *Choice, Character, and Criminal Liability*, 12 *LAW & PHIL.* 345 (1993).



perspective will sometimes collide with other perspectives that also matter to us as citizens and as human beings; and sometimes, we might hope, sentencers and other officers of the institution will be moved by the urgent demands of another conflicting perspective. This is not something that the criminal law itself can sanction or provide for; it precisely involves transcending the law, or breaching its normal limitations. But it is something that we may hope that we are both collectively and individually capable of doing, as citizens and human beings. Faced by a sufficiently serious, tragic case of disadvantageous upbringing, a sentencer might reasonably feel that she cannot—as a matter of conscience and humanity—see the defendant as the criminal law requires her to see him: not because that requirement is itself unjustified, but because this case lies outside the realm of “normal” or “ordinary” cases for which the system is aptly designed. It remains true that from the perspective of criminal justice which defines her role, her communications with him qua sentencer should have the same form and content as her communications with others who are (in the law’s terms) similarly culpable in committing similarly serious crimes; it remains true that from the criminal law’s (legitimate and proper) perspective, this offender’s background and upbringing have no bearing on the punishment he should suffer. But we may hope that sentencers will sometimes allow the demands that belong with another perspective, the demands of compassion for the offender’s tragically disadvantageous upbringing, to break in, when they are insistent enough, and to qualify (one might say, “temper”) those of criminal justice; we may hope, that is, that they will sometimes exercise mercy.<sup>40</sup>

As I have indicated, I am not sure whether a disadvantageous background or upbringing, which does not leave the agent incapable of operating now as a responsible agent within the realm of reasons, constitutes a good reason for the exercise of mercy in the criminal law, however serious that disadvantage is:<sup>41</sup> but my concern here is with the logic, rather than the propriety, of mercy in such contexts. If we think that sentencers can properly show mercy on these grounds, we must also recognise that in doing so they will be allowing mercy to break in

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<sup>40</sup> I have focused here on the character of our penal communications with and to the offender, since mercy is grounded in concern for him. We must not forget, though, that punishment also communicates with others, including in particular the offender’s victims (when there are any): any complete discussion of when mercy can be appropriate in criminal law will need to address the question of how mercy to the offender can still communicate an appropriate message to the victims; but I cannot address that question here. We might be tempted to say that if it is appropriate for the sentencer to show mercy, the victims should also be willing to see the punishment remitted or mitigated, on the same grounds: but this raises the more general question of just what we can reasonably expect or demand of the victims of crime. See Sandra E. Marshall, *Victims of Crime: Their Station and its Duties*, in *MANAGING MODERNITY: POLITICS AND THE CULTURE OF CONTROL* 104 (Matt Matravers ed., 2005).

<sup>41</sup> See *supra* note 38 and accompanying text.

through the bounds by which the criminal law rightly defines their roles as sentencers.

#### V. MERCY, RATIONALITY AND JUSTICE

If we are to see clearly the way in which mercy can operate, as a distinctive value in a liberal criminal law, we must remind ourselves that our social lives are lived within a wide variety of institutions, practices and perspectives, each structured by a distinctive set of aims and values in terms of which we think, deliberate, communicate, and act. The sentencer is also a citizen (a fellow citizen of the offender) and a human being (a fellow human being of the offender);<sup>42</sup> she might also be a mother, a member of an academic department, a member of a political party: but when acting as a sentencer, her deliberations must be structured by the distinctive aims and values, the distinctive criteria of relevance and significance, that belong with that role. Usually, we can hope, these perspectives and roles do not collide: either they come into play in quite different contexts, and so never come into contact; or, in contexts in which more than one could be in play, it is clear which is the appropriate one and which should, at least on this occasion, be ignored. Usually, in a criminal trial, it is clear that the perspective of the criminal law has exclusive authority: the voice to be heard is that of the criminal law; other voices, reflecting other perspectives, must be silent.<sup>43</sup>

Of course, in a decently just system of law, the law's values and criteria will reflect that deeper set of underlying values and principles by which the polity itself is structured, and in terms of which the state deals with its citizens and citizens deal with each other: the criminal law's perspective and voice are not wholly separate from, indeed they are determined by, the social and political values of the political community whose law it is. But because in a liberal polity the criminal law's scope and depth must be quite limited, it must give those values its own distinctively constructed and constrained expression. It is not generally interested in the misfortunes that offenders have suffered, unless they bear directly on their responsibility or culpability (as the law defines those ideas) for their offence: whilst as citizens we should care about a fellow citizen's misfortunes (his sickness, for instance, or the loss of his job or his home), and whilst the polity should provide support for those who suffer such misfortunes, they are not relevant to his treatment, as an offender, by the criminal court. The point is not that sentencers

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<sup>42</sup> On the sense, and importance, of the idea of a fellow human being, see RAIMOND GAITA, *GOOD AND EVIL: AN ABSOLUTE CONCEPTION* 24–41 (1991), and RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* (2002).

<sup>43</sup> And to avoid the danger, or the suspicion, of inappropriate intrusions from one role into another, we require sentencers to recuse themselves in cases of possible conflict: mothers do not sentence their children, friends do not sentence their friends, because we need to ensure that the perspective of parenthood or friendship does not improperly intrude on that of criminal justice.

should not feel sympathy or compassion for misfortune-suffering offenders: as citizens they can and should feel such compassion, but that is irrelevant to the performance of their role as sentencers.<sup>44</sup>

Sometimes, however, the criminal law's exclusive authority is temporarily undermined: sometimes the voice of compassion or sympathy for an offender's suffering demands to be heard even in the courtroom; sometimes the sentencer is right to listen to it and be moved by it, though that is to break out of the strict confines of her role as a sentencer. Sometimes, that is, mercy properly intrrupts into the criminal law and the criminal process.

Some would argue that this reveals a fundamental fissure, contradiction or "antinomy" in liberal criminal law: it purports to be a rational, principled system that abstracts individuals from their social contexts and judges them in the light of clear legal rules and standards; but it does not (it cannot) remain true to that purported ambition, since the messy particularities of social reality keep breaking in, rendering irrational and contradictory what was claimed to be a coherent and rational structure.<sup>45</sup> But this is too quick. If "contradiction" is by definition, as Norrie seems to treat it, a defect in rationality, we should not jump so fast to the conclusion that the criminal law faces contradiction rather than conflict, or is driven into irrationality.

In the realm of scientific or empirical beliefs, conflict does constitute contradiction, and is necessarily a rational defect in a belief system: if two propositions or beliefs are inconsistent with each other, at most one of them can be true, and a system that seeks to contain them both is thereby defective. Now if we took a monistic view of value, or saw morality as a system that should, if it is to provide a suitable guide to action, be grounded either in a single basic principle or in a consistent set of such principles, we would take the same view of the realm of value: if a person's or a group's set of values or normative principles contained two that were inconsistent with each other, that set would be to that extent rationally defective, and would need to be repaired by abandoning or qualifying one of the conflicting elements. But it is by now a familiar claim that, whilst life would be much easier if values never conflicted, the world—the normative world of values—is not like that; we face a world of diverse and irreconcilable values,

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<sup>44</sup> Similarly, whilst sentencers should, as citizens, be interested in the political convictions that motivate the crimes of a dissident or rebel, and should (as all citizens should) be ready to engage in serious debate about them, those convictions are irrelevant in the criminal court; *qua* sentencer, I should ignore them, and resist any temptation to debate them, since the criminal court is not the proper forum for their discussion (though it is crucial to the legitimacy of this exclusion that there should be an effective forum for that discussion). On the problems that this aspect of a liberal criminal law might create, see Emiliios Christodoulidis, *The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom*, in *THE TRIAL ON TRIAL I: TRUTH AND DUE PROCESS* 179 (R.A. Duff, et al. eds., 2005).

<sup>45</sup> See NORRIE, *supra* note 26, at 10–13; ALAN W. NORRIE, PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE 93–117 (2000).

which make ineluctably conflicting demands on us.<sup>46</sup> If that is right, rationality must embrace conflict, rather than shun it as contradiction: a rational moral thinker will face, rather than deny or try to eliminate, the conflicts with which the normative world presents her.

We must of course be careful not to embrace conflict too readily: it can be exciting, or at least easier than careful thought, to leap to the conclusion that what we face in this or that situation is an irremediable conflict of values. But we do sometimes face such conflicts: not, in this case, *within* the perspective of one institution, but rather between that perspective (the perspective of the criminal law, within which sentencers function, and within which offenders appear to be judged and sentenced as offenders) and others which also claim our allegiance. Mercy, I have been suggesting, is an appropriate, rational response to some such conflicts.

Mercy is rational in that it responds to the genuine normative reasons that a situation can provide: it responds, for instance, to the offender's present suffering as a reason for remitting his punishment, as we saw in Part III. As a rational response to the situations that evoke it, mercy is also consistent: although theorists have sometimes portrayed mercy as an arbitrary, even whimsical, exercise of discretion that can favour one wrongdoer whilst ignoring another who is in all relevant respects similar,<sup>47</sup> mercy properly understood does treat like cases alike—as much as justice does, although the criteria of relevant similarity are different.

It is true that a sentencer who shows mercy may treat differently two offenders who do not differ in those respects that bear on penal desert: *A* receives a lighter sentence than *B*, although he was just as culpable as *B* in the commission of an equally serious offence. But that is to say only that mercy is distinct from penal justice, not that it fails to treat *relevantly* similar cases alike. The sentencer will have reason to show mercy to *A*—for instance the suffering that *A* is now undergoing:<sup>48</sup> such suffering is relevant within the perspective of mercy, although not within that of penal justice. If *B* has suffered no similar misfortune, he has no reason to complain that he has not received the kind of mercy that *A* received, since their cases are not *relevantly* alike. If he had suffered a similar misfortune, he would have had reason to complain if *A* received mercy whilst he did not, since their cases would then have been *relevantly* similar: if mercy was appropriate in one case it would also be appropriate in the other. Once we recognise that what counts as a reason is relative to the perspective within which it counts, we can also recognise that whilst from one perspective, that of penal justice, mercy treats like

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<sup>46</sup> See, e.g., ISAIAH BERLIN, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 12 (Henry Hardy ed., 1991); STUART HAMPSHIRE, *MORALITY AND CONFLICT* (1983); Tasioulas, *supra* note 8.

<sup>47</sup> See Harrison, *supra* note 10. For criticism, see Tasioulas, *supra* note 8, at 104–07. See also Card, *supra* note 2, at 186–87.

<sup>48</sup> His suffering might *demand* mercy, not just make it permissible. See Tasioulas, *supra* note 8, at 124–28.

cases differently, from another perspective, that of compassion for another's suffering, it treats like cases alike.

I have argued so far that mercy does have a proper, although limited, role in the context of criminal law and punishment, but that that role cannot be captured or explained *within* the perspective of criminal or penal justice: seen from within that perspective, mercy must appear as something arbitrary or unreasonable (since it is not grounded in what can count as relevant reasons from that perspective). Mercy marks, not an application of penal justice,<sup>49</sup> but rather an intrusion into the sphere of penal justice by moral values and concerns that are not matters of justice. The sentencer who is moved to or tempted towards mercy does not face a conflict between different considerations that belong within her role as sentencer; she faces a conflict between the demands of that role and demands that flow from other perspectives that she also occupies, as a citizen and as a fellow human being to the offender.<sup>50</sup>

Some theorists, however, and in particular some who advocate (as I do) a communicative conception of punishment, argue that we can find a place for mercy *within* such a conception of criminal punishment by grounding mercy in the very values that structure such a theory of punishment: they would therefore argue that I take an unduly limited or impoverished view of what could be part of such a theory—that I fail to recognise how the proper aims of criminal punishment, as an enterprise of moral communication, could be served by the exercise of mercy. It is to two such arguments that I now turn.

## VI. MERCY WITHIN COMMUNICATIVE PUNISHMENT?

The first argument comes from Stephen Garvey, who has written eloquently about the role of mercy in capital sentencing.<sup>51</sup> Punishment, on his account, is intended to constitute atonement for the wrong that was committed, and thus to

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<sup>49</sup> The ideal of mercy is therefore not a "norm [that] fulfills and completes a conception of justice that lies itself at the basis of the rule of law." Nussbaum, *supra* note 36, at 109.

<sup>50</sup> Is there then some master role, or meta-perspective—perhaps that of "citizen," or "moral agent," or "human being"—within which such conflicts between our different perspectives and our different particular roles can be, if not resolved, at least negotiated? Or is moral and social life better seen as a site of conflicts between different perspectives which cannot be brought together within any such overarching view? I cannot pursue this question here, save to note, first, that some version of the former possibility seems necessary if we are to understand ourselves as singular agents at all—if each of us is to be able to say, in a univocal voice, "This is what I must do" (since otherwise my identity as an agent would be dispersed between the identities that belong with different roles); but, second, that we should not suppose that this will lead us towards some overarching set of criteria or principles by which the conflicts we face could be neatly resolved.

<sup>51</sup> Stephen P. Garvey, "As the Gentle Rain from Heaven:" *Mercy in Capital Sentencing* 81 CORNELL L. REV. 989 (1996); see also Garvey, *supra* note 5. The argument that concerns me here is developed in the latter article.

reconcile the offender with those whom he has wronged. The problem posed by capital punishment is that, if the offender deserves the death penalty (something which Garvey grants as a possibility for the sake of argument), then it is only by suffering death that he can atone for his crime. But, first, death makes reconciliation impossible; and second, to impose on the offender a punishment lighter than death also seems to make reconciliation morally impossible, unless the victim's family offers the offender a supererogatory forgiveness, since a morally appropriate reconciliation depends on atonement. Mercy, Garvey suggests, marks an acceptable response to this dilemma: by commuting the offender's sentence, we make both atonement and reconciliation possible.<sup>52</sup>

Now I am not clear how Garvey can maintain his conception of punishment as a process of reconciliatory atonement, and his claim that capital punishment precludes reconciliation, without casting serious doubt on the proposition that he is prepared to "assum[e] for present purposes"—that "death is indeed the deserved punishment for some horrible crimes."<sup>53</sup> For if the proper aim of punishment is reconciliatory atonement, a just and deserved sentence will surely be one that can constitute such atonement; if death cannot constitute such atonement, it cannot be the deserved punishment for any crime. Or, to reverse the argument, if death is "the deserved punishment for some horrible crimes," and capital punishment makes reconciliation impossible, then punishment should not always aim at reconciliation: some crimes are such that we should not, or cannot, aspire to be reconciled with the wrongdoer.<sup>54</sup> A more important point, however, is that Garvey is too quick to reject the idea that there could be genuine moral reconciliation in and through the wrongdoer's death, if he suffers and accepts that death as an appropriate (indeed as the only appropriate) atonement for his crime:

[A]tonement should not be understood as aiming at some fleeting reconciliation gained in the moment before the defendant's death, nor at some quasi-theological reconciliation gained thereafter.<sup>55</sup>

I have argued elsewhere that someone who has committed a terrible crime might rationally (I will not say rightly, if only because this must be a first person

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<sup>52</sup> Garvey, *supra* note 5, at 1339–42. See Garvey, *supra* note 19, on punishment as atonement.

<sup>53</sup> Garvey, *supra* note 5, at 1339.

<sup>54</sup> This is a serious question for any theory of criminal punishment that takes seriously the idea that offenders, once appropriately punished, must be restored to full membership of the political community (although that idea itself comes under serious strain in jurisdictions that operate "three strikes and you're out" sentencing policies, or that permanently deprive convicted felons of the right to vote): are there any crimes or criminal careers so serious that the perpetrator cannot be restored to membership? See Duff, *supra* note 13, at 164–74.

<sup>55</sup> Garvey, *supra* note 5, at 1340.

judgement) come to believe that he has by his crime rendered himself unfit for continued life within a (within any) human community: how can he live, with himself or with others, given his full realisation of what he has done? He might then see suicide not just as an escape from this horror, but as a way—the only way—of carrying through this understanding of the implications of his crime; and by his suicide he might also go at least some way towards reconciling himself with those whom he wronged. By this self-execution, he shows as clearly as can be shown his horrified repentance of his crime, his renewed commitment to the values that he flouted and the community whose values they are; his fellow citizens, when they realise why he has killed himself, can see him again as their fellow—as someone who is restored to community in and by his death.<sup>56</sup> I do not take this to ground a justification of capital punishment: largely because there is too wide a moral gap between a first person judgement that I cannot be restored to human community (except through my death) and a formal third person judgement to that effect, and so between a suicide motivated by that first person thought and an execution justified by its third person analogue. What that thought grounds, however, is not a case for mercy in capital cases, but an argument that death should never be seen as the retributively appropriate punishment for any crime; if we granted, as Garvey grants for the sake of argument, that death could be deserved as a punishment within a communicative conception of punishment as atonement, we would also have to grant that it could serve the penitential, reconciliatory aims of punishment.

The second argument I want to consider here is from John Tasioulas. His main objection to the way in which I have articulated a communicative conception of criminal punishment is that I seek a substantively unitary theory of punishment, one that is then inevitably, given the character and content of the communication that punishment is to involve, dominated by the demands of retributive desert. By contrast, he argues, we should see “the communication of justified censure as the *formal*, overarching justification of punishment” rather than as a “substantial justification in its own right:” a penal practice which has this as its formal or internal aim can and should serve a variety of substantive values—retributive justice, but also such values as mercy and crime prevention.<sup>57</sup> This is not the place for a detailed discussion of that objection, or of Tasioulas’s own more pluralist account, but I should indicate why I think he is wrong to portray mercy as a value internal to a communicative practice of punishment.

I have already discussed two kinds of ground for mercy that Tasioulas also discusses: the offender’s present suffering, and his seriously disadvantageous upbringing: in so far as these are grounds for mercy (rather than factors that reduce

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<sup>56</sup> See Duff, *supra* note 13, at 152–55. As I make clear there, this is not intended as an argument in favour of capital punishment; my point is only that a communicative conception of punishment does not rule it out as quickly or simply as might at first appear.

<sup>57</sup> Tasioulas, *supra* note 2, at 285; see also Tasioulas, *supra* note 8.

culpability), I argued, they lie outside, rather than within, the perspective of criminal punishment in a liberal polity.<sup>58</sup> We should look now at another example, about which Tasioulas and I disagree both as to substance and as to classification—that of the offender who has genuinely repented his crime before he is convicted and sentenced. We agree that such repentance, however deep and genuine, cannot alter penal desert (unless it is so immediately and intimately connected to the wrongdoing as to alter our understanding of the seriousness of the wrong): the repentant offender *deserves* no less severe a punishment than the unrepentant offender. However, Tasioulas argues that such repentance can be a ground for mercy within a pluralist conception of communicative punishment: whereas I will argue that if repentance does give us reason to mitigate criminal punishment, this is not a matter of mercy; but that it should anyway not be seen as a reason to mitigate criminal punishment.<sup>59</sup>

Although the process of penal communication properly focuses on the wrong for which the punishment is now to be imposed, Tasioulas argues that the sentencer can legitimately “widen [her] field of vision beyond the wrongful act—to take account of the nature of the agent and his broader circumstances,” so long as doing so works to the offender’s benefit, *and* “the further facts ... have a requisite connection to the wrongful act to make them bear on justified censure for wrong-doing.” Repentance satisfies both these conditions (the second, because repentance is “the hoped-for consequence of punishment”); thus although this does not affect the offender’s penal desert or rights, “there is an unavoidable sense of excess in insisting on the full infliction of deserved hard treatment given that the offender has already repented”—which is to say that his repentance is a reason to show mercy.<sup>60</sup>

Now were repentance “*the* hoped-for consequence of punishment,” there would indeed be force to the argument that antecedent repentance justifies a mitigation of punishment; and if, as Tasioulas argues, retributive desert is logically prior to and distinct from that “hoped-for consequence,” repentance would be a ground for mitigating *deserved* punishment—and thus a ground for mercy as distinct from justice. But we cannot separate retributive justice from the aims of communicative punishment as sharply as this. What the wrongdoer deserves is, to begin with, a response that censures his wrongdoing in a way that accords with its character and seriousness. If we ask why that deserved censure should be communicated through penal “hard treatment,” rather than through purely verbal denunciations or symbolic punishments, the proper answer is not that this is what he anyway deserves prior to and independently of the communicative aims of his

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<sup>58</sup> See *supra* Parts III–IV; Tasioulas, *supra* note 8, at 116–18.

<sup>59</sup> Tasioulas, *supra* note 2; Tasioulas, *supra* note 8, at 118–19. For the argument of mine that he is criticizing, see DUFF, *supra* note 13, at 118–21.

<sup>60</sup> Tasioulas, *supra* note 2, at 317–18.



punishment; it is, rather, that this provides a suitable structure within which the penitential aims of communicative punishment can be pursued.<sup>61</sup>

That structure is, it is true, designed as a general structure that will be apt for the “normal” run of cases: what constitutes a just and appropriate sentence for such normal cases might be more than is required to induce and to reinforce repentance for a particular offender. It is true too that, insofar as the seriousness of the wrong is communicated (both to the offender, and to others) by the severity of the sentence, any reduction in sentence below the normal level will be read as carrying the message that the crime was less serious: thus if what retributive justice requires is a sentence that communicates the right judgement on the seriousness of the crime, mitigation based on repentance seems to conflict with the requirements of retributive justice. However, the case now seems analogous to those in which we might talk of equity rather than of mercy as a reason to mitigate sentence: cases in which doing penal justice to the individual defendant requires a discretionary departure from the normal presumptive sentence.<sup>62</sup> For in the case of the already repentant offender, who already shares and has already taken to heart the condemnation that his crime deserves, hard treatment punishment (at least of the severity that would normally be appropriate) is not necessary to achieve the communicative purpose of punishment in relation to him—which is surely to say that penal or retributive justice does not demand it. Of course, we would also need to take care that mitigating his punishment did not send the wrong message to others—to the victim, to the wider polity: but it should surely be possible (at least as possible as it is in cases in which a lighter than normal punishment is imposed on grounds of reduced culpability) to make publicly clear that in this case the lighter sentence does not imply a less serious crime.

I might be wrong about this. Perhaps we should see repentance-based leniency in the way that, as I suggested in Part IV, we should see leniency based on an offender’s disadvantageous background or upbringing: a liberal criminal law that is to respect its citizens’ privacy should not take the kind of intrusive interest in their moral state that would be required if repentance were to be formally recognised as a ground for mitigating punishment;<sup>63</sup> but in cases in which the depth and sincerity of an offender’s repentance is obvious, a sentencer might reasonably be moved to leniency. The question then, however, is whether sentencers *should* be moved in this way. I believe that they should not: this is because we should not see repentance as “the hoped-for consequence of punishment.”

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<sup>61</sup> See *supra* text accompanying notes 18–19. Tasioulas’s answer is that “only [hard treatment] punishment adequately conveys the blame the wrong-doer deserves.” Tasioulas, *supra* note 2, at 295–97.

<sup>62</sup> See *supra* note 8 and accompanying text.

<sup>63</sup> On how a system of communicative punishment that aims to induce repentance need not be thus intrusive (since it need not inquire into whether offenders have really repented), see DUFF, *supra* note 13, at 125–29.

Repentance is certainly, on my account as on Tasioulas's, a hoped-for consequence; it is a consequence that is integral to punishment's proper aims. But the penal hard treatment that offenders must undergo is not justified simply as a structure within which, a vehicle through which, repentance might be induced and strengthened; nor is the communication that criminal punishment involves simply a communication from the polity to the offender, communicating an appropriate kind and measure of censure for his wrongdoing. Punishment must also aspire to be or to become a process of communication from the offender to those whom he wronged: the penal hard treatment constitutes a species of moral reparation for the wrong that he did, as a way of giving forceful material expression to the apology that he owes to his victims and to the wider polity. This is the sense in which, by undergoing punishment, the offender "pays his debt" to society: he is required to undergo the punishment as something that he owes to his fellow citizens by way of apologetic moral reparation for his crime.<sup>64</sup> Now within intimate relationships such as families or friendships, moral reparation for wrongdoing is important, but need not take any particular prescribed form: the meaning of the reparative action (as well as the sincerity of the apology that it expresses) can be readily understood. But the criminal law of a liberal polity regulates the civic relationships of citizens who are relative strangers to each other, and must thus prescribe public, conventional rituals of apology and reparation: it must say to the offender that *this*, the punishment prescribed by the court, is the appropriate, conventional way in which you must express your apology and make reparation. Between intimates, expressions of apology can be individualised; between citizens who are relative strangers, and who should not try to inquire closely into what lies behind the public actions of their fellow citizens, apology and moral reparation must take publicly prescribed forms.

Suppose now that an offender has genuinely repented his crime. He will—he must, if he is truly repentant—want to make apologetic reparation to those he has wronged; and since his crime was not just a private matter between him and his victim, but a public matter between him and all his fellow citizens, that apologetic reparation must take an appropriately public, and publicly understandable, form. That form is prescribed by the criminal law and the court that sentences him: he should therefore welcome his punishment, a punishment not mitigated by the fact of his repentance, as the way in which he can make reparation; the sentencer has no reason to mitigate that punishment, since whilst the offender's repentance motivates him to undertake some reparative action, it cannot affect what that reparative action should be.

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<sup>64</sup> See Duff, *supra* note 13, at 94–112, 121–25 (discussing offenders who refuse to accept their punishment as reparation). On why sincerity need not matter in this context, see Christopher Bennett, *Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual*, 23 J. APPLIED. PHIL. 127 (2006).

One final point might make this conclusion rather more palatable. Tasioulas talks of “an unavoidable sense of excess in insisting on the full infliction of deserved hard treatment given that the offender has already repented,”<sup>65</sup> and if one thinks of the kinds of punishment that are all too often inflicted and suffered in both the British and the American penal systems, and in particular of the terms of imprisonment that so many offenders have to serve, it is hard not to agree with that comment. However, that is at least partly because we should be struck by such “an unavoidable sense of excess” when we contemplate those kinds of punishment in general, whether they are imposed on repentant or on unrepentant offenders. If we think instead about the kinds of punishment that would be imposed under a humane and rational communicative system of liberal punishment, punishments that would more often be non-custodial, and much less severe than they generally are now, it will seem less excessive or improper to insist upon “the full infliction of deserved hard treatment” for a repentant offender.

## VII. CONCLUSION

I have argued that mercy, as something distinct from (indeed, opposed to) retributive justice, can play a proper but limited role in a system of criminal justice—a role that can be plausibly explained by a communicative theory of punishment. However, its role is not that of a factor whose relevance is grounded in the proper aims or values of the criminal law itself: it rather intrudes into the criminal law, as a voice that speaks from outside the law in tones that belong to distinct normative perspectives. Mercy is a matter of reason: a sentencer who shows mercy is responding to reasons that make leniency appropriate, and we can engage in rational debate about whether those reasons are, in this or that case, powerful enough to defeat the demands of penal justice. But the realm of practical reasons is, in this as in other contexts, a realm of rational conflict: the claims of mercy conflict irremediably with the demands of justice. That conflict is rational, in that it is a conflict between sets of reasons each of which have proper claims on us as agents; but it does not always admit of rational solutions that leave no moral remainder of legitimate but unsatisfied claims. Justice is not served by mercy; but sometimes it is properly defeated by mercy.

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<sup>65</sup> Tasioulas, *supra* note 2, at 318; see *supra* text accompanying note 60.

